

Statement of John W. Keys III
Commissioner
Bureau of Reclamation
Before The Subcommittee on Water and Power of the Committee on Resources
U.S. House of Representatives
on
H.R. 2202
Lower Yellowstone Reclamation Project Conveyance Act

June 5, 2002

Mr. Chairman, my name is John Keys. I am Commissioner of the U.S. Bureau of Reclamation. I am pleased to provide the Administration's views on H.R. 2202, the Lower Yellowstone Reclamation Project Conveyance Act.

Status and Update on Title Transfer Efforts

Before I get to our comments on H.R. 2202, I would like to give the Subcommittee an update on Reclamation's title transfer activities.

Since 1996, the Bureau of Reclamation has transferred title to twelve (12) projects or parts of projects - pursuant to various Acts of Congress. By the end of the 106th Congress, Reclamation was given authority to transfer title to ten (10) projects or parts of projects. Since each project is unique, each of the laws enacted by Congress has different terms and each requires that different actions - such as the completion of the process under the National Environmental Policy Act (NEPA), or agreements with State and local agencies over recreation or cultural resources management - be taken prior to transfer. I am pleased to say that Reclamation has been moving very diligently to implement each of these laws. Since May 2001, Reclamation has transferred five (5) projects, or parts of projects, all of which were authorized by the end of the 106th Congress.

These are:

- 1) Clear Creek Distribution System of the Central Valley Project (May 31, 2001)
- 2) Palmetto Bend Project in Texas (June 26, 2001)
- 3) Griffith Project in Nevada (July 3, 2001)
- 4) Nampa Meridian facilities of the Boise Project in Idaho (July 13, 2001)
- 5) Carlsbad Project lands and facilities in New Mexico (July 18, 2001).

It is important to note that each of these transfers were completed on time or ahead of schedule and all within the budgets that were estimated when we started. I am very pleased with the effort and priority that our staff has given to completing these transfers in a timely and cost effective way. I would also like to

commend the hard work and cooperation we have received from the water districts and entities who have been the recipients of these facilities as well as the other stakeholders who have been involved.

In each of these successful cases above, a great deal of the work necessary to complete the transfer was begun - often by the receiving entities in cooperation with Reclamation - prior to the legislation's enactment into law. This gave us an important head start and allowed us to recognize and address potential problems in the legislation. In other cases where title has not yet been transferred, limited work on environmental compliance and consultation began prior to enactment. In many of those situations, some difficult - and sometimes unforeseen - issues arose or existed and must be worked through. We are, however, committed to doing that in a timely fashion.

While we have made a great deal of progress and have had much success with title transfer, I remain concerned that the process for completing title transfers takes too long. As such, we have begun a comprehensive review of the *Framework* - the document that guides our title transfer efforts - as well as the transfer process, to find ways to make it more efficient and cost effective. We plan to solicit the views and ideas of our own staff who have been involved in the various transfers, our water user customers and other stakeholders. We also plan to seek the views and ideas of the members and staff of this Committee and the Congress who have been involved. The goal of this effort is to help us to see what worked well, what should be changed and how things might be improved.

HR 2202 - Lower Yellowstone Reclamation Project Conveyance Act

At this point Mr. Chairman, I would like to turn to H.R. 2202, the Lower Yellowstone Reclamation Project Conveyance Act which directs the Secretary of the Interior to transfer title of the Lower Yellowstone Irrigation Project, the Savage Unit of the Pick-Sloan Missouri Basin Program (PSMBP), and the Intake Irrigation Project to the respective irrigation districts.

In October 1999, and again in March 2000, Reclamation testified before Congress on proposals somewhat similar to H.R. 2202. In both cases, Reclamation strongly opposed the legislation as premature since significant issues related to the delivery of Pick Sloan Missouri Basin Program power, fish and wildlife mitigation and a number of other issues remained unresolved. Since that time, Reclamation has worked closely with the districts, the State of Montana and the U.S. Fish and Wildlife Service on a number of these issues. Some progress has been made and some changes have been incorporated into the legislation to reflect that progress. Unfortunately however, significant concerns remain. Therefore, as presently drafted, the Department of the Interior opposes H.R. 2202.

I would like to address, for the Subcommittee, the issues and concerns that have been raised and to identify a number of technical issues for the Committee's consideration.

Delivery of Project Use Power After Transfer: Section 4(c) of H.R. 2202 requires that the Secretary continue to provide the districts with Pick Sloan Missouri Basin Project Use Power at rates established for entities with Federal contracts for irrigation pumping after transfer, even though the facilities are no longer owned by the Federal government. Reclamation, as well as many of the Pick Sloan system preference power customers are very concerned about the efficacy of this action as well as the precedent of providing non-Federal irrigation projects with subsidized electricity intended for use by the beneficiaries of Federal projects. While the legislation proposes to eliminate the adjustment to the rate based upon their ability-to-pay, as drafted the rate paid would still be subsidized by the preference power customers, as it is significantly less than the wholesale PSMBP preference customer rates. The discrepancy is amplified

especially when wheeling costs are considered. The 1944 Flood Control Act requires that PSMBP deliver project use power directly to the major project pumping plants. This has been interpreted to mean that when Federal transmission lines are not available to the major pumping plants and the project use power is wheeled to the major pumping plants over non-Federal transmission lines, the PSMBP, through the power repayment study is responsible for these "in lieu" costs. The cost of this wheeling significantly increased with deregulation of the wholesale power market. Presently, the Federal Government is paying wheeling costs to the Lower Yellowstone Rural Electric Association, the rural electric cooperative serving the Lower Yellowstone and Savage Irrigation Districts. For both the Lower Yellowstone Irrigation District and Savage Irrigation District the cost of wheeling exceeds the cost of the energy. The minimum annual wheeling cost for Lower Yellowstone Irrigation District is \$42,600 and the minimum annual wheeling cost for Savage Irrigation District is \$76,600. Both of these payments are made by Western Area Power Administration and the costs are then incorporated into the PSMBP Power Repayment Study. This results in the preference power customers subsidizing most of the wheeling costs. While I appreciate the districts' efforts to move this forward, serious concerns remain.

Yellowstone Fisheries Protection: There are significant fishery issues that need to be addressed in this basin before title transfer can occur. The lower Yellowstone River has been identified by the Fish and Wildlife Service's Recovery Plan as a priority recovery area for pallid sturgeon, and the Intake Diversion Dam has been identified as a barrier to pallid sturgeon migration and spawning habitat. In addition, the State of Montana is concerned about protection of the sauger, a native fish species.

Section 5 of H.R. 2202 would require the Secretary to provide fish protection devices to prevent fish from entering the project's main canal. It would also require the Secretary to establish a monitoring plan for a minimum of two years following construction. We recommend that this continued Federal oversight and obligation be deleted from the legislation since one of the benefits of title transfer is to relieve the United States of both liability and management responsibility for the facilities.

Price and Valuation: The Administration is concerned that the payment for the lands and facilities proposed in H.R. 2202 does not protect the financial interests of the taxpayers of the United States who made substantial investment in this project. The price tag proposed, which is the "value of the remaining repayment obligation for the Savage Irrigation District," does not reflect a complete analysis of the valuation for the Lower Yellowstone Project. In particular, it must consider the value of the withdrawn lands, which would be transferred under H.R. 2202, but are not included in the allocation of costs that are paid by the districts in their contracts.

Technical Issues

In addition to the items raised above, we have also identified several technical issues that should be addressed:

Mineral Rights: It is unclear whether the legislation, as drafted, intends for any associated mineral rights to be transferred. If mineral rights are to be transferred, an analysis of the value of that mineral right would need to be prepared and paid to protect the financial interest of the taxpayers of the United States. In most cases, especially in those situations where the acquisition of mineral rights were not included when the project lands were acquired, the mineral rights remain in Federal ownership. If that is the intent, then we suggest the following addition to Section3(a):

"Conveyance of all lands herein described shall be subject to a reservation by the United States reserving

all minerals of any nature whatsoever, excluding sand and gravel, and subject to oil, gas, and other mineral rights heretofore reserved of record by or in favor of third parties. Conveyance of the lands herein described is also subject to permits, licenses, leases, rights-of-use, or rights-of-way of record outstanding in third parties on, over, or across said lands or facilities."

Clarify Existing Ownership in Section 3(a)(2): This sentence needs to be clarified to make clear that it is the Federally owned project lands that are being conveyed by this subsection. We suggest the following clarification:

*" . . . convey to the respective irrigation districts by quitclaim deed all fee ownership lands, easements, and rights-of-way **the United States possess which are used** in connection with the projects."*

Documents: Section 3(c) requires that all original documents associated with the Project be provided to the districts. It is the longstanding policy of the United States that all original documents are the property of the United States and should remain so after title transfer. It is appropriate, however, that all relevant records be made available to the district to reproduce. As such, we suggest that Section 3(c) be modified to read as follows:

"The Secretary shall make available to the irrigation districts all patents, land deeds, court proceedings, water right abstracts, contracts, special use permits, licenses, permits, and any other documents of the projects executed on behalf of the Secretary. The irrigation districts may copy such records at their sole time and expense, however, all original project records will be retained by the United States."

Withdrawal Revocation Section 3(b)(3)(B): After the first semicolon, the word *Section* was omitted. The clause should read:

*"and lot 7 of **Sec. 28, T.152N., R.104W.;**"*

Payment as Condition of Transfer: Sections 3(d)(1) and 3(d)(2) need to be made clear that payments by the Savage Irrigation District and the Pick Sloan Missouri Basin Program beneficiaries are a condition of transfer. As drafted, this section requires that the Secretary accept the payment, but there is no clear linkage between the receipt of payment and transfer of these facilities. In both 3(d)(1) and 3(d)(2), the legislation should be modified to read

"As a condition of transfer, the Secretary shall receive . . . "

Payments To Be Made: Section 3(d)(1) and 3(d)(2) authorize that payments be made to fulfill the contractual obligations of the District and of the PSMBP power beneficiaries respectively. It is our understanding that they would repay the present value, rather than the current value, which have potentially different meanings. As such, we suggest that the term *present value* be substituted for the term *current value* in both instances.

Power Assistance Payments: The dollar amounts of the aid-to-irrigation payment obligation reflected in H.R. 2202 should be reduced from \$667,702 to \$615,693 to reflect the current amount of aid-to-irrigation scheduled for the Savage Unit.

Contract Citation: The contract identified in Section 3(d)(1) has expired and has not been renewed. Savage Irrigation District has been operating under an interim contracts. We suggest that Section 3(d)(1) be revised

to read:

"As a condition of transfer, the Secretary shall receive an amount from the Savage Irrigation District equal to the present value of the remaining water supply repayment obligation of \$52,680 as full payment . . ."

Power Customer Payment: It is our understanding that the Savage Irrigation District has not reached agreement with Western Area Power Administration's Firm Power customers on payment of aid-to-irrigation upon title transfer. That should probably be completed before this legislation is enacted and that agreement should be reflected in the legislation. We also suggest that H.R. 2202 be modified to more accurately reflect how the aid-to-irrigation would be repaid and that this payment reflects the full and complete aid-to-irrigation assistance for this unit. This will also make H.R. 2202 consistent with previously adopted title transfer legislation:

"Out of the receipts from the sale of power from the Pick-Sloan Missouri Basin Program collected by the Western Area Power Administration and deposited into the Reclamation Fund of the U.S. Treasury in the fiscal year in which this Act becomes law, the amount established by this Act as payment for aid-to-irrigation shall be treated as full and complete payment by the power customers of all aid to irrigation associated with the facilities of the Savage Unit."

Conservation Easement: It is our understanding that there is agreement between the parties on the conservation easement referenced in Section 4(b). Therefore, we suggest inserting "has been" and deleting "as" in the last paragraph as follows: ***has been mutually agreed upon by . . .***

In closing, let me say that Reclamation continues to work with the districts and the states of Montana and North Dakota on this title transfer. The major issues of concern related to project power and fish screens are difficult ones. But, we are interested in continuing our work with this Committee, the districts, Congressman Rehberg and the Montana delegation to see if creative solutions can be identified.

That concludes my statement, I would be happy to answer any questions.

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